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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matters of )

Application of )

CAPITOL RADIOTELEPHONE, INC. )

d/b/a, CAPITOL PAGING )

For a Private Carrier Paging )

Facility on the 152.48 MHz )

Frequency at Huntington/ )

Charleston, West Virginia; )

Imposition of Forfeiture Against )

CAPITOL RADIOTELEPHONE, INC. )

d/b/a, CAPITOL PAGING )

Former Licensee of Station )

WNSX-646 in the Private Land )

Mobile Services; )

Revocation of License of )

CAPITOL RADIOTELEPHONE, INC. )

d/b/a, CAPITOL PAGING )

Licensee of Stations WNDA-400 and )

WNWW-636 in the Private Land )

Mobile Services; )

Revocation of License of )

CAPITOL RADIOTELEPHONE COMPANY, )

INC. )

Licensee of Stations KWU373, )

KUS223, KQD614, and KWU204 in )

the Public Mobile Radio Service. )

To: The Commission

PR Docket No. 93-231

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**OPPOSITION TO APPLICATION FOR REVIEW**

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RAM Technologies, Inc. ("RAM"), by its attorneys and pursuant to Section 1.115(d) of the Commission's Rules, 47 CFR § 1.115(d), hereby opposes the Application for Review (the "Application") in the above-captioned proceeding, filed by Capitol Radiotelephone, Inc. ("Capitol") on March 25, 1996.<sup>1</sup> RAM respectfully requests that the Commission affirm the Review Board's (the "Board") Decision<sup>2</sup> in this proceeding. In support hereof, the following is respectfully shown:

### **I. Introduction.**

The Commission is, by now, undoubtedly familiar with the long-running disputes between RAM and Capitol; the facts will not be reiterated here. The arguments raised by Capitol here merely rehash the arguments it has been raising in protests of RAM applications for the past year. See Application at 9.

Since this is a responsive pleading, RAM will limit this pleading to a discussion of the Board's determination to strike Administrative Law Judge ("ALJ") Chachkin's findings and conclusions alleging anticompetitive conduct by RAM. For the reasons that follow, RAM respectfully submits that the Board's decision was procedurally and substantively correct, and should be affirmed without delay.

### **II. The Review Board Properly Struck the Dicta Concerning RAM.**

Capitol's Application argues that the Board erred in striking, on its own motion, the Initial Decision's ("I.D.") adverse findings and conclusions against RAM. See Application at 4-

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<sup>1</sup> RAM and the Wireless Telecommunications Bureau (the "Bureau" or the "WTB") previously filed Consent Motions for Extension of Time, to extend the opposition deadline to Friday, April 19, 1996.

<sup>2</sup> FCC 96R-1 (released February 23, 1996).

9. Capitol claims, without citation, that the Board's action conflicts with Commission policy. Contrary to Capitol's claims, the Board acted properly in striking those "findings" and "conclusions" that the ALJ admitted he had no authority to make.

It is axiomatic that the Hearing Designation Order ("HDO") controls the conduct of the hearing, and subordinate Commission officials have no authority to contravene the HDO. See Atlantic Broadcasting Co., 5 FCC 2d 717, 720-721 (1966). RAM was not made a party-defendant to this proceeding; the HDO specified no issues against RAM. If any party to this proceeding believed that RAM's qualifications as a licensee warranted further exploration, the Commission's Rules provide for motions to enlarge the issues at hearing. See 47 C.F.R. § 1.229. No issues were added against RAM by this process.

In short, Capitol, not RAM, was the defendant in this hearing. The ALJ himself noted that he had "no jurisdiction" to enter any adverse findings against RAM. See I.D. at n. 33. The I.D.'s disparagement of RAM was beyond the scope of this proceeding, and was properly stricken by the Board.

Substantively, the Board correctly determined that there was no evidence to support a claim of improper conduct by RAM. As the Board found, other than a disputed declaration by a competitor of RAM's, and speculation by Capitol's paid expert witness, nothing in the record supports Capitol's theory that RAM was the malefactor in this case. See Decision at ¶ 32.

Capitol argues that "substantial testimonial and documentary evidence" supported the I.D.'s aspersions on RAM's character; that is not the case. As findings of "anticompetitive" actions by RAM, the I.D. relies predominantly on the fact that RAM protested Capitol's initial application for the 152.48 MHz frequency, sought reconsideration of the grant of that

application, and complained to the Commission of interference which RAM's facilities suffered following the grant to Capitol. See, I.D. at ¶¶ 12, 29 (n. 13), 31, 65.<sup>3</sup> Capitol accuses the Board of ignoring a "paper war" instituted by RAM against Capitol, and claims that the record demonstrates this allegedly anticompetitive conduct by RAM. See Application at 4, n. 2.

It is well established that licensees may protest applications, or seek reconsideration of application grants, based upon concerns of harmful interference. See, e.g., L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948). The utilization of the Commission's processes to protect one's licensed facilities from potential harmful interference is hardly improper; indeed, it has long been recognized that such licensee-competitors are the most likely parties to bring violations of the Communications Act and the Commission's Rules to its attention. See, e.g., Faulkner Radio, Inc. v. FCC, 557 F.2d 866, 875 and n. 66 (D.C. Cir. 1977). The mere fact that a licensee has invoked the Commission's processes to complain of potential and actual interference falls woefully short of a showing that the complaining licensee has, or intended to, abuse the Commission's processes. See, e.g., Radio Carrollton, 69 FCC 2d 1139, 1150-1151 (1978) (improper motive is not to be inferred from the mere filing of petitions to deny; a party claiming pleadings were filed with "strike" motives "must make a strong showing that delay is the primary and substantial purpose") RAM has done no more than attempt to protect its licensed stations

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<sup>3</sup> Capitol also complains that the "findings" stricken by the Board go directly to the issue of "bias" and credibility of RAM's principals at hearing. The Board need not defer to the credibility findings of an ALJ where, as here, those findings are not supported by the hearing transcripts and record evidence. See, e.g., Gulf Coast Communications, Inc., 81 FCC 2d 499, 506, 48 RR 2d 859, 865 (Rev. Bd. 1980); recon. denied, FCC 82-128 (April 16, 1982). The Board has clear authority to make its own credibility findings, and draw its own conclusions. See Mid-Ohio Communications, Inc., 5 FCC Rcd. 940 (1990). The Board acted well within its authority in this case, and its actions should be upheld.

from harmful interference, in full compliance with procedures established by the Commission's Rules.

As a matter of fact, Capitol's license revocation proceedings were launched in response to FCC Field Operations Bureau ("FOB") determinations that Capitol had intentionally caused interference on the 152.480 MHz frequency. The Review Board properly determined that there was substantial evidence from these investigations to warrant sanctions against Capitol. Other than Capitol's self-serving accusations (which the ALJ inexplicably accepted without basis in fact), there was absolutely no record evidence that RAM had done anything but properly notify the FCC of Capitol's excessive testing and interference with RAM's paging transmissions.

Capitol further alleges that the record shows that RAM "cynically and repeatedly violated the Commission's rules." See Application at 7, n. 2. That is not an accurate characterization of the facts. Following the FOB inspections of both Capitol's and RAM's facilities in August of 1991, the Private Radio Bureau ("PRB") determined that a timer and monitoring device used by RAM violated the Commission's Rules. See Letter of Richard J. Shiben, Chief, Land Mobile and Microwave Division, to RAM Technologies, Inc. (July 30, 1992). RAM openly disclosed this mode of operations to the Commission's inspectors during that inspection. See Decision at ¶29, citing Tr. 259. The PRB warned RAM against future violations, but determined that, since RAM's transmissions did not interfere with any legitimate paging transmissions by Capitol, no enforcement action was warranted. See, Letter of Richard J. Shiben, Chief, supra. The time for the Commission to reconsider the PRB's determination, either on its own motion or at Capitol's request, has long since passed. See 47 C.F.R. §§ 1.106(f), 1.115(d).

In short, the ALJ had no authority to make any findings against RAM, and the record

simply does not support Capitol's fanciful tale of an anticompetitive "plot" against it by RAM. The Review Board properly struck the irrelevant and unsupported findings and conclusions concerning RAM in the I.D., and the Board's Decision should be affirmed.

**III. Capitol has Utterly Failed to Plead Any Legal or Factual  
Grounds for Reversal of its Forfeiture.**

Oddly, Capitol dedicates only one paragraph of its 10-page Application to challenging the aspect of the Board's Decision that legitimately "aggrieves" it; *i.e.*, the Board's determination that Capitol had in fact violated 47 C.F.R. §§ 90.403(e), 90.405(a)(3), and 90.425(b)(2), and imposing a \$6,000 forfeiture. See Application at 3-4. Capitol's mere recitation that the Board's findings on that point "are not supported by substantial evidence in the record as a whole and are otherwise arbitrary and capricious" is wholly insufficient to meet the requirements of the Commission's Rules that applications for review plead with particularity the factors which warrant Commission review. See 47 C.F.R. § 1.115(b)(5).

Since Capitol has failed to meet the minimum pleading requirements for applications for review, its Application should be denied, and the Board's findings concerning those Rule violations should be summarily affirmed.

**Conclusion**

WHEREFORE, the foregoing premises considered, RAM respectfully requests that the Commission deny the Application for Review filed by Capitol Radiotelephone, Inc. in this proceeding, and summarily affirm the Review Board's Decision.

Respectfully submitted,

RAM TECHNOLOGIES, INC.

By: 

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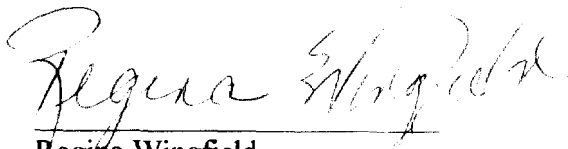
**CERTIFICATE OF SERVICE**

I, Regina Wingfield, a secretary in the law firm of Joyce & Jacobs, Attorneys at Law, L.L.P., do hereby certify that on this 19th day of April, 1996, copies of the foregoing Opposition to Application for Review were sent by first class U.S. mail, postage prepaid, to the following:

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